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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/620,038	07/15/2003	Justin Shimek	6126US	7511

30173 7590 12/08/2006

GENERAL MILLS, INC.
P.O. BOX 1113
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EXAMINER

MAHAFKEY, KELLY J

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 12/08/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/620,038

Applicant(s)

SHIMEK ET AL.

Examiner

Kelly Mahafkey

Art Unit

1761

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 22 November 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☒ Applicant's reply has overcome the following rejection(s): 112 1st.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-39, 79 and 81.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See attached sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

Applicant's amendments made 11/22/06 have been entered. As a result of applicant's amendments, the previous 112 rejections of claims 79-81 have been withdrawn. The 103 rejection of claims 1-39, 79, and 81 remains pending.

Applicant's arguments filed 11/22/06 have been fully considered but they are not persuasive.

Applicant argues that there is no motivation for the addition of glycerin (i.e. a softening agent) to the marshmallow composition as taught by Zietlow. Applicant is referred to the previous office action in which this argument was addressed, as well as the following:


- Zietlow, Column 1 lines 21-35, in which Zietlow teaches moisture loss a problem in marshmallow compositions.
- Zietlow, Column 4 lines 46-51, in which Zietlow teaches that 0.01-25% additional ingredients may be added to the marshmallow composition in order to enhance organoleptic properties.
- Igoe, pages 66-67, which teach glycerin, as a known ingredient in marshmallow composition that prevents moisture loss in food products.

Applicant's argument that there is no motivation to add glycerin (a softening agent) to the marshmallow as taught by Zietlow is not convincing, as one would have been motivated to add glycerin to the marshmallow as disclosed by Zietlow in order to prevent dehydration of the marshmallow.

Applicant argues that Zietlow specifically teaches away from the use of a softening agent, and that the use of a softening agent will destroy the marshmallow product as taught by Zietlow. Applicant is referred to the following:

- Zietlow, Column 3 lines 51-55, in which Zietlow teaches of the marshmallow product as including a corn syrup.
- Zietlow, Column 4 lines 12-18, in which Zietlow teaches of the marshmallow composition as including sodium caseinate.
- Both corn syrup and sodium caseinate are known humectants and thus they are also softeners.
- As acknowledged by applicant, specification paragraph 0010, humectants function as "softeners" in marshmallow compositions, such as the one taught by Zietlow.

Applicant's argument, that the addition of a softener to the marshmallow product as taught by Zietlow would destroy the marshmallow is not convincing as the product as disclosed by Zietlow includes softeners.



KEITH HENDRICKS
PRIMARY EXAMINER